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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA ANTHONY BLOUNT, Defendant and Appellant.	G040851 (Super. Ct. No. 06HF1927) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed.

Bernstein Law Offices, Barry Bernstein and Alison Minet Adams for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

Joshua Anthony Blount appeals from a judgment after a jury convicted him of first degree murder and four counts of attempted murder, and found true he committed murder by drive by shooting and he personally discharged a firearm causing death and great bodily injury. Blount argues (1) there were discovery violations, and the trial court erroneously denied his motions to dismiss; (2) there was a "secret agreement" between the prosecutor and a witness, and the court erroneously denied his motion in limine and motion for new trial; and (3) the court erroneously admitted other bad acts evidence. Although we agree the court should have excluded the other bad acts evidence, we conclude Blount was not prejudiced. We reject his other contentions and affirm the judgment.

FACTS[1]

One August evening, Jose Bracamontes was standing in the alley near his grandmother's home when he saw two men walking towards Carlos Gutierrez (Carlito). After Carlito spoke with them, the two men walked away. Ten minutes later, the two men returned and again spoke with Carlito. One of the men said "F[uck] you" and punched Carlito in the face. The men whistled, and from an apartment at the end of the alley, some men armed with nunchucks and sticks ran towards them. Bracamontes, Carlito, and four friends fled to Carlito's house and told Carlito's mother what happened. After waiting about 20 minutes, they went outside and the mob was gone.

The next day, Bracamontes, his brother, Raul Lopez, and Ricardo Molina were standing in the alley when a girl drove by in a silver Chevrolet Impala. She asked them if they knew where "Joshua" or "Josh" lived and drove to the end of the alley near the apartment where the men had emerged from the previous day. A little later, Blount,

[1] In accord with the usual rules of appellate review, we state the facts in the light most favorable to the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

driving the Impala, and the girl, sitting in the passenger seat drove down the alley. Blount stopped the car and asked them if they were watching his house or trying to get into his house. Bracamontes said he did not know what Blount was talking about, and Blount laughed and replied, "'All right, motherfucker[,]'" and drove away.

Later that night, Bracamontes, Lopez, Molina, Carlos Gutierrez, Edgar Perez, Ivan Barcenas, and Israel Macias were standing in the alley. Blount drove the Impala down the alley and stopped. From inside the car someone said, "'That's them.'" Blount rolled down the window, put his hand out of the window, and fired a handgun approximately nine times.

Lopez was shot in the neck and back. Gutierrez was shot in the leg. Perez was shot in the torso, left arm, and right hand. Barcenas was shot in the abdomen area. Macias was shot in the back and leg—he died within a minute. Numerous people called 911.

Detective Dana Potts arrived at the scene and spoke with Gutierrez who was in the back of an ambulance. Gutierrez told Potts to speak with the "white guys at the end of the alley." Potts learned that Bryce Novoa and Robert Price III lived at the end of the alley at 1383 Baker Street. Potts interviewed both men but they provided no useful information.

The next day, Bracamontes worked with a law enforcement sketch artist to create a composite drawing of the shooting suspect—he had a shaved head, goatee, and mustache. He could not identify the woman from photographic lineups.

Law enforcement officers found several nine millimeter shell casings at the scene. The shell casings matched those found at the scene of an unsolved shooting that occurred in Santa Ana in 2005. The shell casings were fired from the same gun, most likely a Glock handgun.

Days later, there was a memorial car wash for Macias to raise money for his funeral. Molina saw people moving out of 1383 Baker Street, Novoa and Price's apartment. Daniel Welker took photographs at the car wash.

Based on the ballistics information, Potts identified Blount as a suspect. Potts obtained a photograph of Blount and prepared photographic lineups with his picture. The following month, Bracamontes identified Blount as the man who looked like the driver of the Impala. He also identified a man who was present when Carlito was punched.

A few weeks later, Perez picked Blount's picture from a photographic lineup, and said he was "70 percent sure" it was him. Molina also identified Blount as the shooter. Lopez as well selected Blount from a photographic lineup. Barcenas could not identify anyone from the photographic lineups because he never got a good look at the shooter.

An information charged Blount with murder (Pen. Code, § 187, subd. (a))[2] (count 1), four counts of attempted murder (§§ 664, subd. (a), 187, subd. (a)) (counts 2 to 5), and three counts of dissuading a witness by force or threat (§ 136.1, subd. (c)(1)) (counts 6 to 8).[3] As to count 1, the information alleged Blount personally discharged a firearm causing death (§ 12022.53, subd. (d)), and committed special circumstance murder by drive by shooting (§ 190.2, subd. (a)(21)). With respect to counts 2 to 5, the information also alleged he personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)).

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[2] All further statutory references are to the Penal Code, unless otherwise indicated.

[3] During trial, on the prosecutor's motion, the trial court dismissed counts 6 through 8.

At trial, when the prosecutor showed Bracamontes a picture of Anthony Dispensa, Bracamontes stated he was not the driver of the Impala. When the prosecutor showed Molina a picture of Dispensa, Molina stated he was not the driver of the Impala. When the prosecutor repeatedly asked Molina whether he saw the shooter in court, he said he did not.

The prosecutor offered Dispensa's testimony; he testified pursuant to use and derivative immunity. Dispensa testified he was from Chicago and had been living with Novoa and Price for about two months——Dispensa worked for Price's father. Dispensa met Blount when he was living in Tustin when he was younger. Blount, Paul Velarde, and Novoa's brother, Brandon Novoa (Brandon), all visited the Baker Street apartment regularly. On the day of the shooting at about 5:00 p.m., Dispensa, Price, the Novoa brothers, and Blount were all at the apartment. When a girl from Los Angeles arrived, she told Blount someone had spit on her, and Blount left to talk with the hawker. Dispensa left, and a little later Price called him and said Blount et al. were in the alley talking with the guys from the other side of the alley. Dispensa returned to the alley, and when he arrived, Blount, upset, was in the car's driver's seat and the girl was in the passenger seat, and Novoa was talking to Blount. When Dispensa asked him what was happening, Blount said "he was going to go to Compton and get some homies." Dispensa returned to the apartment. A little later, Blount called Dispensa and told him he would return soon and to have Brandon ready to meet him outside. Blount called again and said he was there, and Dispensa and Brandon both went outside. Blount told them "they were going to go down there and get down with those guys." Dispensa testified he thought they were going to fight the guys, and he got into the back passenger seat of the Impala and Brandon got in the front passenger seat.

Dispensa testified Blount drove to the end of the alley near the group of men. As Dispensa prepared to get out of the car, he heard gunshots and he closed his eyes and ducked. After Blount drove away, Dispensa said, "'What the fuck?'" and Blount replied, "'Don't start tripping.'" Blount added, "Don't start acting like a bitch.'" Blount drove to David Ortega's house and met him and the girl Blount was with earlier. Blount told Ortega to dispose of the gun. Blount told Dispensa to not worry because Dispensa did not do anything and they could not be found because there were no license plates on the car. When someone from the Baker Street apartment complex called and told them one person had died and others were shot, Blount, Brandon, and Novoa stayed at a hotel in Los Angeles.

Dispensa testified that about a week later, he, Blount, Price, Novoa, and Velarde discussed the shooting. Blount asked them what the police had asked them and said there would be repercussions if anyone said anything to the police. Dispensa drove back to Chicago.[4] At some point Dispensa called his mother and asked her for help getting a lawyer. Dispensa stated he never told his mother he was the shooter or that he killed anyone. Dispensa said police arrested him and the prosecutor charged him with murder. Dispensa stated he did not tell the police the truth during his first interview because he was scared. He said that while he and Blount were in jail together, Blount told him, "'Fucking snitch. Motherfucker, you're dead.'" Dispensa said he then decided to cooperate with police.

On cross-examination, Dispensa testified that at the time of the shooting his hair was short, he had a mustache and hair on his chin, and weighed about 140 to 150 pounds. He had tattoos on his chest and arm.

[4] There was testimony police searched Dispensa's home near Chicago and found no evidence of gun ownership.

The prosecutor offered Blount's cellular telephone records that confirmed Dispensa's version of the events that night. The prosecutor also offered evidence law enforcement officers found a gun cleaning package, gun cleaning pads, and a Glock 17 firearm owner's manual at Blount's mother's home. Officers also found a gun cleaning kit and two boxes of nine millimeter ammunition at Blount's Compton residence. There was evidence a Glock 17 handgun uses nine millimeter ammunition. And the prosecutor offered evidence that while Blount was in custody he called Ortega and told him to "go talk to that fool down the street," and he needed to "[g]et the lady out of the house."

Finally, the prosecutor also offered evidence pursuant to Evidence Code section 1101, subdivision (b). In October 2004, Jason Prather was at a Halloween party at his girlfriend's parents' house in Santa Ana. When Prather attempted to get a beer at the keg, Blount became upset Prather cut in front of him. Prather tried to diffuse the situation by saying do not worry "brother," and Blount responded he was not Prather's "brother." Prather replied, "You're right, your [*sic*] not my brother." Prather turned away, and Blount hit him on the side of the face. Prather tried to fight back, but Blount ended up on top of Prather. When Prather's girlfriend's brother, John Heesch, tried to help Prather, Blount hit him, and Blount's confederates attacked Heesch. By the time police arrived, Blount and his friends were gone.

Exactly one year later, Prather and his girlfriend were asleep in the same house when someone fired 10 to 15 shots at the front of the house. The next day, Heesch saw a strange car with four people inside parked in his driveway in the early morning in Diamond Bar. The following day, the same car blocked his driveway—Blount was inside the car. The car left and returned several times, but deputies did not respond to Heesch's call. A few days later, Heesch again saw the car several times, but each time deputies arrived the car was gone. Heesch and his brother, who lived nearby, were frightened and they armed themselves. The next day, Heesch saw a man who was carrying something walk towards his brother's house. When the man knocked and

looked through a window, Heesch called his brother, grabbed his gun, and ran across the street. Thinking the man was Blount, Heesch shot him. He was not Blount. The man was an Iraqi war veteran who was selling real estate door-to-door. Heesch was convicted of assault with a deadly weapon.

Blount offered Welker's testimony. Welker testified people at the car wash recognized occupants of a light blue BMW that drove by the car wash. Welker and two others got into a car and followed the BMW. Welker took a picture of a man getting out of the car—he was Hispanic, about five-feet, 11-inches tall, weighed about 180 pounds, bald, and had a tattoo on his neck. Welker found detectives who were nearby but they could not locate the car. Welker gave the film to the detectives.

Dispensa's mother, Patricia Morin, testified for the defense and stated that four years prior to trial she had suffered a traumatic brain injury, which causes her to have difficulty remembering the timing of events or details. She initially stated Dispensa called and told her that he had shot someone. She then stated Dispensa told her "they" had shot someone. Dispensa stated he did not shoot anyone. Morin testified that in a subsequent telephone conversation, Dispensa repeated he did not shoot anyone and asked her to provide an alibi for him. She said Dispensa told her that he and Blount were in the car, but Velarde shot the victims. Dispensa also told her that he would be out of jail by Christmas.

Potts testified Morin told him Dispensa was not innocent, and Dispensa told her that he shot someone. Potts also stated Morin told him that she was having difficulty keeping the facts straight. She added that before her testimony, she had never stated Dispensa told her Velarde was the shooter.

Finally, Blount offered the testimony of an expert on eyewitness identification, Dr. Robert Shomer. He testified the major impediment to an accurate eyewitness identification is stress, such as a life-threatening situation. He added that

when an eyewitness states a person "looks like" the assailant, it is a rejection of the identification.

The jury convicted Blount of all counts and found true all enhancement allegations. After the trial court denied his new trial motion, the court sentenced him to life in prison without the possibility of parole.

DISCUSSION

I. Discovery

Blount argues the trial court erroneously denied his motions to dismiss because there were discovery violations. We disagree.

A. Legal Principles

"Pursuant to *Brady* [*v. Maryland* (1963)] 373 U.S. 83 (*Brady*), the prosecution must *disclose* material exculpatory evidence whether the defendant makes a specific request [citation], a general request, or none at all [citation]. The scope of this disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge 'any favorable evidence known to the others acting on the government's behalf . . . .' [Citation.]" (*In re Brown* (1998) 17 Cal.4th 873, 879, italics added.) "Evidence is 'favorable' if it either helps the defendant or hurts the prosecution . . . . [Citation.] [¶] Evidence is 'material' 'only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different.' [Citations.]" (*In re Sassounian* (1995) 9 Cal.4th 535, 544.)

Additionally, "Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to *preserve* evidence 'that might be expected to play a significant role in the suspect's defense.' [Citations.] To fall within the scope of this duty, the evidence 'must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' [Citations.] The state's responsibility is further limited when the defendant's challenge is

to 'the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.' [Citation.] In such case, 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' [Citations.] [¶] On review, we must determine whether, viewing the evidence in the light most favorable to the superior court's finding, there was substantial evidence to support its ruling. [Citation.]" (*People v. Roybal* (1998) 19 Cal.4th 481, 509-510, italics added.)

B. Procedural History

On March 23, 2007, Blount moved for pretrial discovery of "unaltered original copies" of recordings of interviews because the previously submitted recordings were "inaudible, heavily edited, and/or incomplete." At the April hearing on the motion, defense counsel requested the motion be taken off calendar because counsel had spoken with a district attorney investigator who was working to resolve any discovery issues. In May, the investigator informed defense counsel law enforcement had the same compact disc recordings defense counsel had and portions were incomplete and/or inaudible.

In July 2007, Blount again moved for pretrial discovery. He requested the undeveloped or developed film Welker gave police. Pursuant to *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*), and *Arizona v. Youngblood* (1988) 488 U.S. 51 (*Youngblood*), he also moved to dismiss the case because of the loss or destruction of compact disc recordings of law enforcement interviews. In September 2007, at the hearing on the motion, defense counsel asked the discovery motion be taken off calendar. As to the *Trombetta/Youngblood* motion, defense counsel argued portions of recorded interviews were inaudible and "might be exculpatory" and "might either substantiate . . . Dispensa as being the shooter or involve someone else besides . . . Blount being the shooter . . . ." The prosecutor agreed portions of the recorded interviews were inaudible because of environmental or equipment issues. The prosecutor added there was no

evidence to support defense counsel's claim the inaudible portions of the tape included exculpatory evidence and there were police reports summarizing each of the interviews. The prosecutor explained multiple eyewitnesses identified Blount as the shooter, and the only statement that could even remotely be considered exculpatory was a telephone call in which Dispensa told Morin "we shot" someone. The prosecutor concluded there was no evidence of any intentional or grossly negligent interference with exculpatory evidence. The trial court denied the *Trombetta/Youngblood* motion.

On October 16, 2007, Blount again moved for pretrial discovery of Welker's film or photographs. The motion was supported by Welker's and Salinas's declarations. The following month, the motion was taken off calendar.

On November 20, 2007, Blount again moved to dismiss because of loss or destruction of evidence, both the photographs and recordings, pursuant to *Trombetta/Youngblood*. He also moved to set aside the information because in part law enforcement has negligently or deliberatively failed to provide a exculpatory photograph.

At the hearing in April 2008, the trial court denied Blount's motion to set aside the information. With respect to the *Trombetta/Youngblood* motion, the court indicated it had reviewed and considered all the written submissions. Blount offered Isaac Torres's testimony. Torres testified he was at the car wash when he saw a "suspicious vehicle" drive into the alley, someone delivered a package, and the driver backed out of the alley and drove away. Torres and Welker got into a car and followed the blue BMW. Torres stated one of the car's occupant's had a shaved head and tattoos on his neck. Welker gave an undercover detective the roll of film.

Blount also offered Detective Patrick Wessel's and Potts's testimony. Wessel and his partner were in the area of the shooting when dispatch notified them a suspicious vehicle was in the area. When they drove to the area, some men gave them a roll of film. Potts testified they determined the BMW belonged to Novoa's father. Potts stated the undeveloped film was sent to an off-site laboratory for development. Potts

explained that when they received the developed film, Wessel made a copy of the photographs and forwarded the copies to the prosecutor to give to defense counsel. Potts testified neither he nor anyone he knows of destroyed photographs.

Defense counsel argued the police or the prosecution must have lost or destroyed one photograph because the roll included 36 exposures but there were only 35 photographs. The prosecutor offered a copy of the contact sheet developed from the roll of film showing 35 pictures and one blank exposure. The prosecutor noted neither Welker nor Torres was involved in the shooting and neither knew whether the BMW's driver was involved. The prosecutor added law enforcement was aware of the blue BMW because Blount was a friend of Novoa and Novoa's father owned the BMW. The prosecutor concluded there was no evidence the police tampered with, discarded, or destroyed any evidence.

The trial court declined to reconsider the trial judge's (Judge Toohey) prior ruling concerning the recorded interviews. As to the photographs, the court opined there was no *Trombetta/Youngblood* violation and denied the motion. The court stated defense counsel offered no evidence law enforcement lost or destroyed any photograph. The court added it did not appear there was any missing exculpatory or material evidence.

Shortly before trial, Blount moved to exclude admission of any audio recordings unless Evidence Code sections 1400 and 1401's requirements were met. At the hearing, defense counsel argued the recordings were inaudible and inaccurate, and they should not be admitted. The prosecutor argued this was the third time defense counsel attempted to litigate this motion. The prosecutor added that because of environmental and equipment issues, some of the field recordings were of poor quality. The prosecutor concluded he did not intend to use any of the recordings in his case-in-chief.[5] The trial court noted Blount's motion was remarkably similar to his

[5] Indeed, the only audio recordings that were admitted were recordings of two telephone calls Blount made while he was in custody.

Trombetta/Youngblood motion, which had been denied. The court denied the in limine motion reasoning, "it goes to weight not to admissibility."

C. Analysis

Although Blount claims both *Brady* and *Trombetta/Youngblood* are implicated, the gravamen of his argument is law enforcement officials deleted, destroyed, erased, or lost exculpatory evidence. Additionally, the parties litigated Blount's claims within the *Trombetta/Youngblood* framework. Therefore, we will address his contentions within *Trombetta/Youngblood's* duty to preserve requirement, and not *Brady's* duty to disclose obligation.

1. Audio Recordings of Witness Interviews

Blount argues the trial court erroneously denied his July 2007 motion to dismiss because "law enforcement delete[d], destroy[ed], erase[d], or los[t] exculpatory statements from witnesses who inculpated individuals other than [him] . . . ." Nonsense.

Here, there was substantial evidence to support the trial court's conclusion law enforcement officials complied with their duty to preserve evidence—the compact disc recordings. At the hearing on the motion, the prosecutor admitted portions of certain tapes were inaudible. He explained some of the interviews occurred in the field where wind interfered with the recording. He also explained some of the interviews occurred at the police department where because of the recording equipment, one tape ends and another begins so there is a short delay. Further there was no evidence the inaudible portions of the audio recordings include exculpatory evidence. Indeed, there was evidence demonstrating there were police reports summarizing all the interviews.

Further, given the speculative value of the audio recordings, Blount was required to show bad faith on the part of law enforcement officers. (*Youngblood, supra,* 488 U.S. at p. 58.) Blount offered no evidence of bad faith. Therefore, there was substantial evidence supporting the trial court's ruling there was no *Trombetta/Youngblood* violation.

2. Welker Photographs

Blount contends the trial court erroneously denied his November 2007 motion to dismiss because law enforcement "lost or destroyed an entire roll of negatives and a single obviously exculpatory photograph from the developed film." Not so.

Again, there was substantial evidence to support the trial court's conclusion law enforcement officials complied with their duty to preserve evidence—the photographs. The evidence offered at the hearing on the motion demonstrated Welker purportedly took photographs of a clean shaven, bald, Hispanic man with tattoos in a blue BMW and gave the undeveloped roll of film to Potts. Although Welker did not testify at the hearing on the motion and therefore there is no evidence concerning the photographs or the film,[6] the roll of film included 36 exposures. Based on our review of the photographs, 30 of the photographs are of the memorial car wash. There is a photograph of a car dealership sign, three photographs of the ground, and a photograph of a brick wall. There is one exposure, the first exposure on the roll, that is black. Thus, Blount complains about one photograph he claims shows the real shooter in a blue BMW that law enforcement officials allegedly lost or destroyed. The evidence does not support his assertion.

There is one exposure, the first exposure on the roll, that is black. The evidence demonstrated Potts logged the undeveloped roll of film into property and an investigator sent the film to an outside laboratory to be developed. There was no evidence Wessell or Potts destroyed one exposure on the undeveloped film. Nor is that a reasonable conclusion.

Moreover, substantial evidence supported the trial court's determination the photograph if it existed was not material or exculpatory. Law enforcement officers knew the blue BMW belonged to Novoa's father, and neither Welker nor Torres witnessed the

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[6] The fact Welker testified later is of no consequence.

shooting so any assertion they saw the shooter is unfounded. Further, given the speculative value of the claimed missing photograph, Blount was required to show bad faith on the part of law enforcement officers. (*Youngblood, supra,* 488 U.S. at p. 58.) Again, Blount offered no evidence of bad faith.

3. Miscellaneous Claims

Blount also cursorily suggests the six-pack line up photographs were never provided to defense counsel. He does not explain how these photographs are material exculpatory evidence. He also asserts police officers interviewed people at the car wash and "*if* these statements or interviews were memorialized or recorded . . . they have never been provided to [him] . . . ." (Italics added.) Yet at the April 2008 hearing on the *Trombetta/Youngblood* motion, defense counsel stated "All we have [are] the transcribed interviews . . . where . . . Potts is interviewing these people at the car wash." Because we have concluded there is no evidence law enforcement officers failed to disclose or failed to preserve material exculpatory evidence, we need not address Blount's claim the prosecutor committed misconduct.

II. Dispensa's Testimony

Blount contends the prosecutor had a "secret deal" with Dispensa concerning his testimony, and therefore, the trial court erroneously permitted him to testify and erroneously denied his new trial motion. As we explain below, neither contention has merit.

Before trial, Blount moved to exclude Dispensa's testimony. Defense counsel argued the prosecution was required to disclose any deal or promise of leniency and Dispensa could not testify. The trial court denied the motion finding there was no evidence of any deal or promise of leniency. The court reasoned that although *Brady, supra,* 373 U.S. 83, required the prosecutor to disclose any deal or promise of leniency, there was no basis for excluding the witness's testimony if the deal or promise of

leniency was disclosed. The court opined Blount's claim was speculative because he failed to show the existence of any deal or promise of leniency.

The prosecutor granted Dispensa use and derivative immunity in any pending or future criminal proceeding. The agreement required Dispensa to testify completely and truthfully concerning the shooting. The agreement stated, "[it] is not an offer of leniency nor is it to be construed as such in any manner. It is further understood the People have offered nothing in consideration for any cooperation . . . Dispensa may, or may not, decide to provide in this interview."

At trial, Dispensa testified he was not promised anything in exchange for his testimony. Dispensa stated he understood he could be prosecuted for murder, and he had not made any deal with the prosecutor in exchange for his testimony.

Dispensa testified on May 29, 2008. The jury convicted Blount on June 4, 2008. Blount claims the prosecutor dismissed the charges against Dispensa on June 6, 2008.

Blount moved for a new trial in part because the prosecutor "fail[ed] to disclose an either already-existing or potential pending plea agreement, and/or the prosecutor's consideration of dismissal of . . . Dispensa's case . . . ." The prosecutor argued there was no agreement, and there was no evidence there was an agreement the prosecutor would dismiss the charges against Dispensa in exchange for his testimony. The trial court denied the new trial motion. The court reasoned that although there was some evidence Dispensa believed he would be released by a certain date, there was no evidence there was an agreement that if Dispensa testified in a particular manner the prosecutor would dismiss the charges.

A. Motion In Limine

"The prosecution has a duty to disclose all substantial material evidence favorable to an accused, including evidence relating to the credibility of a material witness. [Citation.] '[S]uppression of substantial material evidence bearing on the

credibility of a key prosecution witness is a denial of due process . . . .' [Citation.] Since a witness's credibility depends heavily on his motives for testifying, the prosecution must disclose to the defense and jury any inducements made to a prosecution witness to testify and must also correct any false or misleading testimony by the witness relating to any inducements. [Citations.]'" (*People v. Phillips* (1985) 41 Cal.3d 29, 46.) We defer to the trial court's factual findings but review the court's determination of law independently. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1273.)

Here, Blount moved to exclude Dispensa's testimony because he was "offered leniency and consideration for his cooperation, and . . . there is a pending plea offer for [him] based upon his testimony against . . . Blount." Blount offered two bases for the existence of such an agreement. First, Dispensa was arraigned before him but Dispensa had received nine continuances without legitimate cause which all occurred shortly after Blount's court dates. Second, Morin told a defense investigator that Dispensa told her that he would be out of jail by Christmas and one of the detectives told her that Dispensa would receive immunity if he testified and cooperated.[7] At the hearing on the motion, the trial court reasoned that although there was evidence Dispensa hoped the prosecutor would consider his testimony in determining how to proceed with the case, Blount offered no evidence of an agreement. We agree.

There was no evidence of an agreement between the prosecutor and Dispensa that if Dispensa testified in a certain manner, the prosecutor would dismiss the charges against him. The fact Dispensa did not have a preliminary hearing and was granted continuances does not evince a furtive agreement. Although Blount sees sinister implications in continuing Dispensa's case, it is more likely the prosecution was delayed merely to determine whether Dispensa would honor his commitment to testify truthfully

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[7] Blount asks us to take judicial notice of the transcript of the entire interview. This was a sealed portion of the record, and we need not take judicial notice of it to consider it.

at Blount's trial. Similarly, that Dispensa might have told his mother he hoped to be out of jail by the holidays or a detective might have told Morin the prosecutor would grant Dispensa immunity is not evidence of an agreement. The trial court properly allowed Dispensa to testify.

B. New Trial Motion

A trial court may grant a new trial motion based on an error of law or when a defendant has discovered new material evidence. (§ 1181, subds. (5) & (8).) "In reviewing a motion for a new trial, the trial court must weigh the evidence independently. [Citation.] It is, however, guided by a presumption in favor of the correctness of the verdict and proceedings supporting it. [Citation.] The trial court 'should [not] disregard the verdict . . . but instead . . . should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.' [Citation.] [¶] A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. '"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 523-524.)

Here, along with the basis Blount offered to support his in limine motion, in his new trial motion, he asserted the prosecutor dismissed the charges against Dispensa two days after the jury convicted him. Blount stated, however, his "argument is not based on the fact that Dispensa was released from all charges two days after his verdict was announced; Dispensa's dismissal was the element that proved defense counsel's new argument in his Motion in Limine, and this proved [his] argued circumstantial and direct evidence." Thus, Blount offers no new material evidence to support his motion but instead seeks to litigate his in limine motion again.

We agree with the trial court that Blount offered no evidence there was a secret agreement that if Dispensa provided favorable testimony the prosecutor would dismiss the charges against him. Blount has offered nothing in his new trial motion to persuade us otherwise. As to the prosecutor dismissing the charges against Dispensa, at the hearing on the new trial motion the prosecutor explained the day of the hearing when the prosecutor moved to dismiss the charges was scheduled weeks before hand. The prosecutor added that because he believed Dispensa's testimony, the prosecutor felt it would have been unethical to further detain him.

Additionally, the immunity agreement was admitted into evidence. Defense counsel cross-examined Dispensa about the truthfulness of his testimony and whether he had an agreement to testify in a certain manner to satisfy the prosecutor. Finally, the trial court instructed the jury with CALCRIM No. 336, "Witness Instruction (Modified)," as follows: In evaluating the testimony of . . . Dispensa, you should consider the extent to which it may have been influenced by the expectation of any benefit from the party calling the witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in light of all the evidence in this case." Thus, the trial court properly denied Blount's new trial motion. Because we have concluded there was no evidence of a "secret agreement," Blount's claim the prosecutor committed misconduct by failing to disclose such a deal is meritless.[8]

[8] We decline Blount's invitation to order an evidentiary hearing to litigate for the third time a claim on which he has twice been unsuccessful.

III. Evidence Code section 1101, subdivision (b)

Blount claims the trial court erroneously admitted evidence of prior bad conduct.[9] We agree but conclude he was not prejudiced.

Before trial, Blount moved to exclude evidence of the 2005 shooting pursuant to Evidence Code sections 1101 and 352. At the hearing on the motion, the prosecutor argued the 2005 evidence was relevant to show the connection between Blount and the weapon that was used in 2005 and the weapon that was used in the charged offenses. The prosecutor stated the evidence was not offered to prove Blount was the shooter in 2005. Defense counsel responded the connection was too tenuous and speculative. The trial court indicated it was inclined to allow the evidence but exclude the evidence a gun was used.

The next day, the trial court ruled: "I'm proceeding on the position that the prosecution can establish the sequence of events from the Halloween party, October of [20]04, to the shooting at that same house October of [20]05, to [Blount] being present at the Diamond Bar residence two days later. And having thought about it since we discussed this matter yesterday, the probative value of that sequence of events becomes more apparent to the court in terms of the court's -- or in terms of the prosecution's theory that your clients involvement in the [20]05 shooting may reasonably be inferred by the confrontation at the same residence in October of [20]05-- [20]04, and his subsequent presence at his combatant's residence and thereto following shooting. So I see the probative value. [¶] In terms of prejudice, the prejudice, as it relates to [Blount], would be the prejudice that he was involved in a fight in October of [20]04 at a Halloween party. I already precluded the prosecution from offering testimony that that fight involved him pulling a gun or brandishing a gun or a gun over a keg. The other

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[9] Blount does not raise the issue and we do not address whether the trial court should have instructed the jury with CALCRIM No. 375, "Evidence of Uncharged Offense to Prove Identity . . . ."

aspects of prejudice is the time it would take to present evidence on this point. But to the extent that it's an identification case, a who-done-it case, for lack of a better term, the People have every right to offer evidence to attempt to establish *identity* by connecting [Blount] up with a firearm that was used in the murder of the victim in this case. It's not an issue of weight. That's for the jury to decide. It's an issue of admissibility. [¶] I find there is probative value in this attempt to link [Blount] to this weapon [10] months prior to the murder on our case. I don't find that the prejudice in having the jury hear [Blount] was involved in a fight or the prejudice and spending time to map out that sequence of events would be prejudicial under [Evidence Code section] 352 . . . . [¶] In weighing and evaluating the probative value, I do not find the prejudice outweighs the probative value. [The] People may offer the evidence of the Halloween matter and the aftermath with the restrictions the court has imposed." (Italics added.)

Evidence of uncharged acts is generally inadmissible to prove criminal disposition. (Evid. Code, § 1101, subd. (a); *People v. Kipp* (1998) 18 Cal.4th 349, 369.) However, a trial court may admit evidence of other crimes to prove identity, among other things. (Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*).) "'The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.' [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 22-23.) Other acts evidence is relevant where the other acts evidence and the charged offense are sufficiently similar. (*Ewoldt, supra,* 7 Cal.4th at pp. 401-402.)

There must be similarities between the other crime and the charged offense to provide identity. (*Ewoldt, supra,* 7 Cal.4th at p. 402.) "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the

inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" (*Id.* at p. 403.)

Although other acts evidence might be relevant to prove a material fact other than a defendant's criminal disposition, this evidence is subject to exclusion pursuant to Evidence Code section 352. (*Ewoldt, supra,* 7 Cal.4th at p. 404.) Evidence Code section 352 authorizes the trial court to "exclude evidence if its probative value is substantially outweighed by the probability" its admission will create a substantial danger of undue prejudice. For purposes of Evidence Code section 352, "prejudice" means "'evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citation.]'" (*People v. Heard* (2003) 31 Cal.4th 946, 976.) We review a trial court's ruling for an abuse of discretion. (*People v. Valdez* (2004) 32 Cal.4th 73, 108.)

Here, the prosecutor offered evidence that demonstrated the following: In October 2004, Blount attacked Prather at a house party.[10] Exactly one year later in 2005, Prather and his girlfriend were asleep in the same house when someone fired multiple shots at the front of the house. Two days later, Heesch, the son of the owners of the house, saw Blount in a car outside his house in another county. Heesch and his brother, who lived across the street, were so frightened they armed themselves and were constantly on the lookout for suspicious people. Heesch shot an innocent, Iraqi war veteran, door-to-door salesman, who was on his brother's front porch.

The same weapon was used in the October 2005 shooting and the offenses charged here. However, the weapon was never recovered. A ballistics expert testified a

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[10] At oral argument, appellate counsel stated Dispensa was at the party, although counsel could not point to any place in the record that supports her claim. Indeed, our review of the record uncovered no evidence he was at the party.

Glock 17 uses nine millimeter ammunition, and evidence Blount may have possessed a Glock 17 was admitted into evidence.

We agree that when considered in its entirety one could reasonably infer that Blount was present when someone fired a gun at the front of the house in October 2005 because one year prior he was at a fight at the same house and a couple days after the shooting he was at the house owners' son's house many miles away. But that is all one can reasonably infer. When admitting prior bad conduct evidence to prove identity, the crime's pattern and characteristics must be so extraordinary and unique as to be like a signature. We have no signature here. The evidence is too speculative and tenuous to support the inference Blount fired a nine millimeter gun at the front of the house in October 2005 and used the same gun nine months later in the charged offenses. Therefore, the probative value of this evidence to prove identity was extremely weak.

Additionally, any probative value of the evidence is substantially outweighed by undue prejudice. Remembering the speculative nature of the evidence, the jury was permitted to infer Blount fired approximately a dozen shots at a house. Moreover, the evidence permitted the jury to infer Blount caused an understandably frightful man to shoot an innocent war veteran who the man suspected was Blount. Needless to say, this evidence would provoke an emotional bias against Blount. That does not end our inquiry however. We must now determine whether there was reversible error. We conclude there was not.

As a general matter, the application of the ordinary rules of evidence does not impermissibly infringe on a defendant's constitutional rights, and therefore, the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390.) Here, Dispensa testified Blount was the shooter. And, witnesses identified Blount as the shooter. Additionally, the ballistics evidence established a nine millimeter gun was used in the offenses charged here, and

there was evidence Blount possessed a nine millimeter gun. Finally, while Blount was in custody, he told his friend to speak with the "fool down the street" and to "[g]et the lady out of the house." Based on our review of the entire record, we conclude it was not reasonably probable that had the trial court excluded the other bad acts evidence, Blount would have received a better result. Thus, admission of the other bad acts evidence does not require reversal.

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.